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December 20, 2019

FREEDOM OF INFORMATION ACT REQUEST

Submitted via <https://www.foiaonline.gov>

Regional Freedom of Information Officer
Environmental Protection Agency, Region 10
1200 6th Avenue
Suite 155, Mail Stop 11-C07
Seattle, WA 98101

Re: Public Comments on Proposed Reissuance of NPDES General Permit for Concentrated Animal Feeding Operations Located in Idaho (IDG010000)

Dear FOIA Officer:

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch. This request seeks all public comments submitted to EPA regarding EPA's recently noticed Proposed Reissuance of NPDES General Permit for Concentrated Animal Feeding Operations ("CAFO") Located in Idaho (IDG010000).¹ This request includes any and all public comments that have been or will be considered by EPA in development of the Final Permit for CAFOs located in Idaho.

This request applies to all such records in any form, whether submitted by physical mail, facsimile, or electronic mail. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record.

We emphasize that this request applies to all described documents the disclosure of which is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (1) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (2) explain in full the basis on which nondisclosure is sought; and (3) provide us with any segregable portions of the records for which you do not claim a specific exemption.

Interest of Requester

Food & Water Watch ("FWW") is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to

¹ 84 Fed. Reg. 56809 (Oct. 23, 2019).

the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. One of FWW's specific focus areas is industrial livestock production, including the environmental, social, and economic impacts of this industry. FWW works to ensure that government entities and elected representatives protect communities and the environment from the harms caused by industrial livestock production.

Request for Responsive Documents in Electronic Form

To the extent possible, FWW requests that EPA provide any responsive documents to this request in electronic form. For such electronic documents, please deliver them by email or electronic storage device to the contact information provided below.

Fee Waiver Request

FWW requests that you waive any applicable fees for this request because disclosure is clearly in the public interest. As described below, disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); see 7 CFR 1, Subpart A, Appendix A, §6(a). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as FWW, access to documents in the government's control without the payment of fees. The courts have stated that the statute "is to be liberally construed in favor of waivers for noncommercial requesters." See *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (stating "that Congress amended FOIA to ensure that it is 'liberally construed in favor of waivers for noncommercial requesters'"). As explained below, FWW meets the test for a fee waiver established in FOIA and outlined in the USDA implementing regulations, 7 C.F.R. Part 1, Subpart A.

I. Disclosure of This Information Is in the Public Interest because It Will Significantly Contribute to Public Understanding of the Operations or Activities of the Government

FWW qualifies for the fee waiver because the requested information will significantly contribute to public understanding of Federal government operations or activities. See 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(i-iv). FWW, a leading environmental and food safety organization that is recognized as an advocate for stronger oversight of industrial livestock production, possesses the ability to disseminate the requested information to the general public. Because EPA Region 10 is not maintaining a publicly accessible docket for submission and review of public comments submitted in this matter, only EPA has access to the full information provided to it or the positions advocated by public commenters, and the identity of those commenters. EPA will consider these comments when formulating the Final NPDES General Permit for CAFOs located in Idaho, which could shape the contents of that Permit. How EPA addresses

these comments in relation to the full scope of the information presented and by what interest groups is important information that illuminates how public involvement informs EPA's decision making. This is precisely the type of information that FWW is well positioned to analyze and disseminate to our members and the general public.

A. The subject matter of the requested documents concerns operations or activities of the Federal government

FWW seeks public comments submitted to EPA that will shape EPA's final decisions regarding the contents of Idaho's Final NPDES General Permit for CAFOs. The NPDES permitting program is the cornerstone of EPA's mandate to regulate pollution under the Clean Water Act. Public involvement in EPA's decision making is a central feature to how EPA operates. As such, the information requested clearly "concerns the operations and activities of the federal government." 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(i).

B. The disclosure is likely to contribute significantly to public understanding of Federal government operations or activities

Disclosure is "likely to contribute to an understanding of Federal government operations or activities," 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(ii). EPA will take public comments into consideration when making any changes to the proposed Draft General Permit for CAFOs in Idaho, and how EPA does so is of significant importance. Because public input is an essential part of EPA's decision-making process, how EPA treats any and all public comments provides insight into how the Agency conducts its process. If EPA adopts information or requests from certain public comments and not others, the full scope of those comments and the identity of the commenter(s) are details important to how and why EPA reaches a final decision on Idaho's next NPDES General Permit for CAFOs.

FWW's consistent contribution to public understanding of federal agency activities that affect the environment, as compared to the level of public understanding prior to disclosure, is well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994). FWW is a membership organization with a staff of over 100, including researchers, organizers, attorneys, and communications professionals. Food & Water Watch has scientific and legal expertise and our staff regularly write, speak, and advocate on environmental issues.

FWW also has a demonstrated record of garnering significant media attention for our work related to Federal government transparency. We are uniquely qualified to analyze the EPA's final decision in relation to the full scope of public comments submitted regarding the Draft Permit, present it in an easy to understand manner, and disseminate it to a large cross-section of the general population, such that the disclosure

will “contribute to ‘public understanding.’” 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(iii). Given FWW’s expertise and ability to contribute to public understanding through various channels, FWW could “contribute significantly” to public understanding EPA’s process for considering public comments in developing the Final NPDES Permit for CAFOs in Idaho. 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(iv).

II. Food & Water Watch Has No Commercial Interest in Obtaining the Information

The second element of the fee waiver analysis addresses the requester’s “commercial interest” in the information. Two questions must be addressed when determining whether the information requested is “primarily in the commercial interest of the requester.” 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(vi). The first question is whether the requester has a commercial interest that would be furthered by the requested disclosure. 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(v). Here, as a 501(c)(3) nonprofit entity, FWW has no commercial, trade, or profit interest in the material requested. FWW would not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested. The requested material would be disseminated solely for the purpose of informing and educating the public and would not be used for commercial gain.

The second factor hinges on the primary interest in the disclosure. 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(vi). Clearly, there is public interest in the release of the materials sought because they will allow for a more thorough analysis of EPA’s consideration of public comments from various interested parties in development of the Final NPDES General Permit for CAFOs in Idaho. Thus, even if FWW did have some “commercial” interest in the documents requested, a complete fee waiver would still be appropriate because FWW’s “primary” interest in the material is to inform the public about the operations and activities of the government. Therefore, this is not a situation in which “the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requestor.” *Id.* The “disclosure of the information . . . is not primarily in the commercial interest of” FWW and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

Accordingly, based on the above analysis, the requested records will contribute significantly to a broad public understanding of the full scope of information and requests before the EPA in developing the Final NPDES General Permit for CAFOs in Idaho, and will not serve any commercial interest on the part of FWW. Under these circumstances, FWW fully satisfies the criteria for a fee waiver. If for some reason the fee waiver is denied, please contact me before incurring any costs related to this request. If the fee waiver is not granted and costs are incurred prior to contacting me, FWW will not be responsible for any costs. FWW reserves the right to appeal any decision to deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at (208) 209-3569 or tlobdell@fwwatch.org. Additionally, if you are not the proper recipient of this request, please identify which office has information responsive to this request.

Thank you in advance for your prompt reply.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Lobdell", written over a light gray rectangular background.

Tyler Lobdell
Staff Attorney
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